IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 26684-2-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
BRIAN D. ELLIS,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, J. — A jury convicted Brian Ellis of three counts of first degree theft. He argues that the trial court erred in admitting evidence of two prior theft convictions under ER 609(b) and ER 404(b). We conclude that the trial court did not abuse its discretion by admitting the convictions to impeach Mr. Ellis and, once he opened the door by discussing the facts of the underlying convictions, there was no error in permitting the prosecution to put on additional evidence concerning the two prior incidents. We affirm.

FACTS

Mr. Ellis was charged with the three counts of theft after he was alleged to have taken advantage of his elderly neighbor, Glen Schachtschneider. In 1999, Mr. Ellis, his wife, and his three children moved next door to Mr. Schachtschneider, who was 74 at the time of trial in 2007. Mr. Schachtschneider's wife was in a nursing home, so the retired sawmill worker lived by himself. The new neighbors became well acquainted and a close relationship developed between the elderly man and the young family next door.

Mr. Schachtschneider would occasionally give the struggling family money and took out loans in his own name for two cars that the family bought. Mr. Ellis made the monthly payments on the cars. This close relationship continued up to the point where Mr. Schachtschneider was hospitalized for shoulder surgery in 2006. He signed some blank checks and asked Mr. Ellis to pay his bills while he was away. Mr. Schachtschneider returned home after ten days. For the next six months he did not receive any bank statements. Eventually, Mr. Schachtschneider found his account overdrawn and discovered numerous checks written to both Mr. Ellis and to businesses that were not creditors of Mr. Schachtschneider.

Mr. Ellis was cut off from the Schachtschneider checking account when a care nurse took over aiding Mr. Schachtschneider and an investigation ensued. Eventually,

three counts of first degree theft were filed in the Okanogan County Superior Court. The first and second count involved specific checks valued in excess of $1,500 written to Mr. Ellis from Mr. Schachtschneider's account. The third count involved a series of smaller checks written on Mr. Schachtschneider's account to Mr. Ellis and to local businesses. It also was alleged that two aggravating factors existed: the defendant abused a position of trust and the victim was particularly vulnerable. The parties stipulated that the abuse of trust aggravating factor existed and the particular vulnerability factor was dismissed by agreement. The case proceeded to jury trial on the three substantive counts without jury consideration of the aggravating factors.

The prosecution sought to admit evidence of three prior instances of theft by Mr. Ellis both to impeach him under ER 609 and as substantive evidence under ER 404(b). Two of the incidents had resulted in convictions: a second degree theft conviction in 1995 involving theft from an employer and a third degree theft conviction in 1994 involving use of funds belonging to a youth baseball team. The third incident involved a loan from a friend that Mr. Ellis never repaid.

After considering the arguments of counsel, the court deferred the ER 404(b) decision until after the defense case-in-chief. Report of Proceedings (RP) (Nov. 7, 2007) at 253. The court considered a six-factor balancing test and ruled that the two

convictions would be admissible to impeach Mr. Ellis if he testified, but the questioning would be limited to the date and name of each conviction. *Id*. at 253-257, 266, 273-274. The uncharged incident would not be admitted for purposes of impeachment, but might be admissible, along with the two convictions, to prove the defendant's intent under ER 404(b). *Id.* at 257-259.

Mr. Schachtschneider testified for the prosecution. He denied loaning Mr. Ellis money or authorizing Mr. Ellis to use Mr. Schachtschneider's account to pay Ellis family bills. Mr. Ellis testified that Mr. Schachtschneider had loaned him some of the money and had given him money in the other instances because he was aware of the tough financial times facing the Ellis family. He denied being the writer of several of the checks and the corresponding check registry entries. He also denied ever taking advantage of Mr. Schachtschneider. RP (Nov. 8, 2007) at 29-40.

Defense counsel asked Mr. Ellis about the two prior convictions. Mr. Ellis told jurors that he pleaded guilty to second degree theft in 1995 involving the alleged taking of $350 from his employer. He was not guilty of that crime, but pleaded guilty at the insistence of his public defender because he would not have to do any jail time. He also discussed the third degree theft conviction. He informed the jurors that he had used the baseball team's money, but was unaware at the time he was not allowed to use the funds

for the purposes he did.[1] *Id.* at 21-23.

After the defense rested, the trial court revisited the ER 404(b) issue. The court changed its mind and decided that the loan incident would not be admissible. *Id.* at 95. The other two matters, which had resulted in convictions, had involved "special relationships" and evidence about those matters was admissible to establish the defendant's intent. *Id.* at 95-96. The court and parties also discussed whether to provide a limiting instruction concerning the prior incidents. Defense counsel believed it would be confusing to the jury. The court agreed. *Id.* at 99, 136. No limiting instruction was given.

The prosecution brought in Mr. Ellis's former employer to discuss the second degree theft incident. He testified that Mr. Ellis received money from customers and did not place it in the till. The employer eventually put a video camera in the building and discovered Mr. Ellis taking money from the till. *Id.* at 114-117, 124-128. The deputy sheriff who investigated the incident related Mr. Ellis's statements that he did take money from the till for his personal use. *Id.* at 110-112. One of the parents of a baseball player testified that they discovered money was missing from the team's account when they did not have sufficient funds to order new uniforms for the following season. *Id.* at 103-107.

[1] In cross examination, Mr. Ellis told jurors that he had paid for some team pizza parties and had rented a van to drive the team to Wenatchee. He later learned he could not use the team's money for those purposes. RP (Nov. 8, 2007) at 59-60.

In rebuttal, Mr. Ellis testified that he did not steal money from the customers, but that on one occasion he placed a large payment on the shelf instead of in the till. *Id.* at 131.

In closing argument, defense counsel contended that Mr. Schachtschneider was confused about the checks and also was concerned that his loss of control might lead to loss of independence. Counsel also pointed out how anomalous entries continued after Mr. Ellis no longer had access to the checking account. No mention was made of Mr. Ellis's prior convictions. *Id.* at 176-187. In rebuttal argument, the prosecutor stressed the problems began during the period Mr. Ellis had access to the account and that he was the beneficiary of the checks. *Id.* at 187-191. The prosecutor concluded that Mr. Ellis was the one with the motive and that he was not above taking money from people who trusted him. *Id.* at 192.

The jury convicted Mr. Ellis as charged. The court imposed an exceptional concurrent sentence of 14 months[2] on each count based on the stipulated aggravating factor of abuse of trust. Mr. Ellis then appealed to this court.

ANALYSIS

The issue in this appeal is whether the trial court erred by admitting evidence of the two prior convictions under either ER 609 or ER 404. We address each rule in turn.

ER 609(b). Appellant argues that the trial court abused its discretion by admitting

[2] The standard range for each count was 3-9 months.

the eleven- and thirteen-year-old theft convictions. ER 609(a)(2) permits convictions that involve dishonesty to be used to attack the credibility of a witness. A trial court has no discretion about admitting crimes of dishonesty. *State v. Jones*, 101 Wn.2d 113, 117, 677 P.2d 131 (1984). Convictions for theft are considered crimes of dishonesty and are *per se* admissible under ER 609(a)(2). *State v. Ray*, 116 Wn.2d 531, 545, 806 P.2d 1220 (1991).

However, ER 609(b) provides that if a conviction is over ten years old, a trial court can only admit the conviction if it finds that the probative value of the conviction outweighs its prejudicial effect. Whenever a trial court has discretion whether or not to admit a prior conviction, it should apply a six factor test to determine if a conviction is admissible to impeach a witness. *State v. Alexis*, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980); *Jones*, 101 Wn.2d at 118. The factors that a court should consider include:

> (1) the length of the defendant's criminal record; (2) remoteness of the prior conviction; (3) nature of the prior crime; (4) the age and circumstances of the defendant; (5) centrality of the credibility issue; and (6) the impeachment value of the prior crime.

Alexis, 95 Wn.2d at 19.

The parties argued these factors to the trial court, which considered them in its exercise of discretion. We believe the *Alexis* factors squarely supported the trial court's balancing. But for the age of the crimes, the two theft convictions would have been *per*

se admissible, and if the trial had been a year earlier there would have been no question about the admission of the second degree theft offense. There also was a similarity between the prior crimes and the current one because the defendant took advantage of money entrusted to him. Critically, the impeachment value of the two crimes was high and credibility was clearly the central issue in the case. Mr. Ellis contended that the checks were written to him as gifts or loans. Mr. Schachtschneider, who could not explain what all of the checks were for, was adamant that he had not authorized the payments. Which witness to believe was the key issue for the jury, and the prior theft convictions were a factor that the jury could consider in making that credibility determination.

Not all of the factors favored admission of the prior convictions. However, the trial court's decision was supported by several of the *Alexis* factors. It had a tenable basis for concluding that the prior convictions were admissible. Accordingly, there was no abuse of discretion. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The trial court did not err in admitting the two prior theft convictions to impeach the defendant. ER 609(b).

ER 404(b). Mr. Ellis also argues that the court committed error under ER 404(b)

by admitting these prior bad acts. The trial court, however, essentially limited the evidence to further impeachment and only admitted the evidence once the defense opened the door to consideration of the facts. There was no error.

Evidence of "other bad acts" is permitted to establish specific purposes such as the identity of an actor or the defendant's intent or purpose in committing a crime. ER 404(b). Those purposes, in turn, must be of such significance to the current trial that the evidence is highly probative and relevant to prove an "essential ingredient" of the current crime. *State v. Lough*, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). Evidence admitted under ER 404(b) is considered substantive evidence rather than impeachment evidence. *State v. Laureano*, 101 Wn.2d 745, 766, 682 P.2d 889 (1984), *overruled in part by State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906 (1989); *State v. Wilson*, 60 Wn. App. 887, 891, 808 P.2d 754, *review denied*, 117 Wn.2d 1010 (1991).

The decision to admit evidence of other bad acts under ER 404(b), as with most evidentiary rulings, is a matter within the discretion of the trial court. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003); *Lough*, 125 Wn.2d at 863. Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, *supra.*

The trial court did not admit the evidence about the other bad acts in the State's

case-in-chief. Rather, it was limited to impeachment or rebuttal evidence once the defense had presented a case. In this situation, we question whether or not ER 404(b) is truly implicated. "ER 404(b) applies only to prior misconduct offered as substantive evidence." *Wilson*, 60 Wn. App. at 891 (citing 5A Karl B. Tegland, *Washington Practice*: *Evidence Law and Practice* § 114 (3d ed. 1989)).

Assuming, without deciding, that ER 404(b) was actually at issue in this case, there is a more fundamental basis for rejecting Mr. Ellis's argument here. That is because he opened the door to consideration of the facts underlying the prior convictions. He denied committing the second degree theft offense. Accordingly, his prior employer testified briefly about how Mr. Ellis was eventually caught by a camera. The deputy sheriff testified, also briefly, about Mr. Ellis's admissions that he repeatedly took money from his employer's till. This was basic impeachment by contradiction. Mr. Ellis opened the door to further consideration of this topic when he denied committing the one crime and attempted to innocently explain away the other offense. *State v. Swan*, 114 Wn.2d 613, 653-654, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991); *State v. Renneberg*, 83 Wn.2d 735, 738, 522 P.2d 835 (1974); *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969); *Ang v. Martin*, 118 Wn. App. 553, 563, 76 P.3d 787 (2003), *aff'd*, 154 Wn.2d 477, 114 P.3d 637 (2005). Even at that, the prosecutor put on only

brief evidence concerning the other offenses and limited the testimony to directly contradicting Mr. Ellis's innocent explanation of his prior behavior rather than extensively discussing the facts underlying the prior offenses.

Under these circumstances, the trial court certainly had a tenable basis for admitting the evidence. The other, and expressly stated, basis for admitting the evidence was to establish Mr. Ellis's "intent." While this was a proper purpose for admitting the prior incident evidence and the defendant's intent was a critical component of this case, we need not address the propriety of this rationale since the defendant opened up consideration of the prior misconduct by his own testimony. There was no error.

The convictions are affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

_____
Korsmo, J.

WE CONCUR:

_____
Schultheis, C.J.

_____
Sweeney, J.